NO. 82-1667

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GEORGE S. LEACH

Petitioner

vs.

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

and

LOCAL 43, NATIONAL ASSOCIATION OF LETTER CARRIERS, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Where Title 39 USC Section 409 (Suits by and against the Postal Service), provides a jurisdictional basis for suits against the United States Postal Service, and such jurisdiction and suits are expressly made subject to the provisions of Title 28 USC governing limitations of time for bringing action in suits in which the United States is a party, and suit is commenced by an employee against his employer the United States Postal Service pleading Title 39 USC Section 409 as a jurisdictional basis independent of and in addition to Title 29 USC Section 185 (Section 301 Labor Management Relations Act) as a basis for such suit, the rule of *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 101 S.Ct. 1559 (1981), is improperly applied to dismiss the action against the employer, United States Postal Service.

II

The rule of *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 101 S.Ct. 1559 (1981), is not properly applied to dismiss an employee's action against his union.

III

The rule of *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 101 S.Ct. 1559 (1981), is not properly applied to retroactively dismiss Petitioner's Complaint against Respondent employer and union.

PARTIES TO THE PROCEEDINGS BEFORE THE CIRCUIT COURT

In addition to the parties set forth in the caption of the case, the following were party defendants, party respondents herein:

WILLIAM BOLGER
Postmaster General
Washington, D.C. 20261

JOHN P. DORAN
Regional Postmaster General
United States Postal Service
Central Region
433 West Van Buren Street
Chicago, Illinois 60699

K. W. COOLEY
District Manager, United States Postal Service
P.O. Box 29177
Columbus, Ohio 43229

CHARLES CATON
Local Postmaster General
Post Office Annex Station
1623 Dalton Street
Cincinnati, Ohio 45214

RICHARD LINDSEY
Station Manager
Post Office Annex Station
1623 Dalton Street
Cincinnati, Ohio 45214

WILLIAM J. LANGE
Manager, Station Branch Operations
United States Post Office
Cincinnati, Ohio 45234

VINCENT SOMBROTTO
President, National Association of Letter Carriers
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ED FISHBECK
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, affirming the decision of the United States District Court for the Southern District of Ohio, Western Division, dismissing Petitioner's Complaint, was recommended for publication, but to date is unreported, and set forth herein as Appendix A.

The order and opinion of the United States District Court for the Southern District of Ohio, Western Division, dismissing the Petitioner's Complaint, is unreported and set forth herein as Appendix B.

JURISDICTION

The Court of Appeals for the Sixth Circuit affirmed the opinion of the United States District Court, Southern District of Ohio, Western Division, by decision and judgment dated January 17, 1983.

This Court has jurisdiction to review that judgment and decision by virtue of 28 U.S.C. Section 1254 and Part V of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, and the Statutory provisions involved herein, 39 USC 409, 39 USC Section 1208, 28 USC Section 2401, 29 USC Section 185 (Section 301 LMRA), are set forth verbatim in the Appendix, as Appendices C, D, E, F and G.

STATEMENT OF THE CASE

Petitioner was discharged from employment with the United States Postal Service by notice given August 29, 1978, effective October 5, 1978.

Petitioner invoked the grievance procedure available to him and utilized such up to and including arbitration. Petitioner sought and was granted the representation of his union through said procedure. The Arbitrator's decision upholding the dismissal was dated February 27, 1979.

The Decision of the Arbitrator upheld Petitioner's discharge. Subsequently he inquired of and requested the union's assistance in appealing said Arbitrator's Decision, was promised such by his union, but at no time did his union furnish any such assistance.

Petitioner caused a Complaint to be filed against his employer, United States Postal Service, and his union, its "local", the National Association of Letter Carriers and Local 43 thereof, in the United States District Court for the Southern District of Ohio, Western Division, on October 6, 1980, seeking redress against his employer for their action, in the first instance, of discharging him from employment therewith, and against his union for their failure to adequately represent him in grievance proceedings, both prior to and in the discharge matter. (Appendix H).

Petitioner's jurisdictional basis for his suit against his employer, the U.S.P.S., was based, in pertinent part, upon Title 39 U.S.C. Section 409 (Suits by and against the Postal Service), separately and independently of and in addition to Title 29 U.S.C. Section 185 (Section 301 Labor Management Relations Act), and was so set out in Petitioner's Complaint. (Appendix H, p. 26a). Petitioner's action against his employer was for wrongful discharge from employment and for breach of the Collective Bargaining agreement then in effect, and, in essence, a contract claim, and was so stated therein. (Appendix H, par. 1, 41, pp. 25a, 35a).

Petitioner's action against his union, both "local" and "national", was jurisdictionally predicated, in pertinent part, upon 29 USC Section 185 (Section 301 LMRA), and for their failure to render to him adequate representation in the grievance/arbitration procedure.

On April 20, 1981, this Court rendered a written opinion in the case of *United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56, 101 S.Ct. 1559 (1981), holding that, in a Section 301 LMRA action against an employer, the most analogous state statute of limitations must be looked to to determine the appropriate time period for commencement of suit, because Congress has not enacted any Statute of Limitations governing such actions against the employer. This Court held therein that the most analogous statute was that governing post arbitration relief, 90 days in New York, and applied that

statute and time period to find the Petitioner's suit therein untimely.

Shortly thereafter, the party Defendants in Petitioner's action, sought permission to raise the defense of Statute of Limitations.[1] Permission was granted, Respondents asserted said defense, and filed motions for summary judgment seeking dismissal of Petitioner's Complaint, seeking application of the rule of *Mitchell* and Ohio's ninety (90) day post arbitration relief statute of limitation.

The United States District Court for the Southern District of Ohio, Western Division, granted those motions and dismissed Petitioner's Complaint as untimely. (Appendix B).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, and after briefing and argument thereon, the Sixth Circuit rendered an opinion and decision affirming the action of the District Court. (Appendix A).

REASONS FOR GRANTING WRIT

There are special and important reasons for granting review of this matter pursuant to writ of certiorari.

First, the Sixth Circuit Court of Appeals, in affirming the dismissal of Petitioner's Complaint by applying the Rule of *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 101 S.Ct. 1559 (1981), decided the issue before it in a way in conflict with this court's decision in *United Parcel Service, Inc.* v. *Mitchell, supra,* and this court's prior decisions of *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), and *Czosek* v. *O'Mara*, 397 U.S. 25 (1970), because Petitioner's action against his employer was distinct from that against his union and was governed by a specific congressionally legislated Statute of Limitations period as set out in Title 39 USC Section 409.

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[1] Only Respondent NALC raised this defense initially in its Answer to Petitioner's Complaint.

Second, the retroactive application by the Sixth Circuit Court of Appeals of the *Mitchell* rule is in conflict with the decision of the Ninth Circuit Court of Appeals in *Singer* v. *Flying Tiger Line, Inc.*, 652 F 2d 1349 (9th Cir. 1981).

Third, the Sixth Circuit Court of Appeals decided this issue in a way in conflict with the decision of the Fifth Circuit Court of Appeals in *Edwards* v. *Sea Land Service, Inc.*, 678 F 2d 1276 (5th Cir. 1982), by applying the same statute of limitations to the Respondent's employer and unions.

ARGUMENT

I

WHERE TITLE 39 USC SECTION 409, (SUITS BY AND AGAINST THE POSTAL SERVICE), PROVIDES A JURISDICTIONAL BASIS FOR SUITS AGAINST THE UNITED STATES POSTAL SERVICE, AND SUCH JURISDICTION AND SUITS ARE EXPRESSLY MADE SUBJECT TO THE PROVISIONS OF TITLE 28 USC GOVERNING LIMITATIONS OF TIME FOR BRINGING ACTION IN SUITS IN WHICH THE UNITED STATES IS A PARTY, AND SUIT IS COMMENCED BY AN EMPLOYEE AGAINST HIS EMPLOYER THE UNITED STATES POSTAL SERVICE PLEADING TITLE 39 USC SECTION 409 AS A JURISDICTIONAL BASIS INDEPENDENT OF AND IN ADDITION TO TITLE 29 USC SECTION 185 (SECTION 301 LABOR MANAGEMENT RELATIONS ACT) AS A BASIS FOR SUCH SUIT, THE RULE OF UNITED PARCEL SERVICE, INC. vs. MITCHELL, 451 U.S. 56, 101 S.CT. 1559 (1981), IS IMPROPERLY APPLIED TO DISMISS THE ACTION AGAINST THE EMPLOYER, THE UNITED STATES POSTAL SERVICE.

Petitioner's employer (Respondent U.S.P.S.) and the Union (both "local" and "national") occupy distinct and separable

positions with regard to their conduct giving rise to Petitioner's action against them, and to the jurisdictional, factual and legal claims of Petitioner against each of them, such that any single determination as to one of them should not necessarily and summarily be dispositive toward the other.

In the usual situation involving an action by a discharged employee against his union and employer, the employer is joined with the union as a "pendant Defendant" pursuant to the 29 U.S.C. Section 185 (2) (Section 301 LMRA) claim. This type of claim against both parties is commonly characterized as a "hybrid Section 301-breach of duty action"; the duty of the union implied from the LMRA, the employer's liability stemming from its initial discharge of the employee, and its presence being necessary to provide appropriate relief to the aggrieved employee. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976); *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), footnote 2; Justice Stewart's concurring opinion therein; also, *Fair Representation, The NLRB and the Courts*, Timothy J. Boyce, Labor Relations and Public Policy Series, number 18, C. 1978, pp. 69-70.

Here, the claim against the Respondent-Employer, U.S.P.S., is not of the "hybrid type" claim pursuant to Section 301(a) LMRA. This action is predicated upon an independent jurisdictional statute, 39 USC Section 409(a) (Appendix D), and involves independent and distinct factual allegations and legal claims asserted against the Respondent-Employer, U.S.P.S., than against the Respondent unions. (Appendix H). Petitioner's action against Respondent-Employer, U.S.P.S., is one for wrongful discharge in violation of the collective bargaining agreement, a pure contract claim.

It is a recognized principal of labor law that an action may be asserted against both the employer and union, or against either one, independently of the other. *Czosek* v. *O'Mara*, 397 U.S. 25 (1970); see Justice Rhenquist's dissent, *Hines* v. *Anchor Motor Freight, supra*, at 576. Clearly, if independent

actions may be maintained against one or the other absent joinder, independent legal claims and jurisdictional basis may be made against the union or employer whether or not they are joined in the same action.

In pertinent part, 39 USC Section 409, entitled "Suits by and against the Postal Service", subsection (a) gives the U.S. District Courts original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Subsection (b) makes any such actions, "unless otherwise provided in this Title", subject to "the provisions of Title 28 relating to limitations of time for bringing action in suits in which the United States . . . are parties." 2 U.S. Code, Congressional and Administrative News – 1970; Legislative History, p. 3674, Section 113 (39 U.S.C. Section 409). (Appendix I).

37 U.S.C. Section 409 has been recognized as a jurisdictional basis for bringing "labor dispute" actions against the United States Postal Service. *Neal* v. *U.S.P.S.*, 468 F.Supp. 958, 960 (D.C. Utah 1979); *Lester* v. *U.S.P.S.*, 465 F.Supp. 545, 547 (D.C. Ariz. 1979); See also *White* v. *Bloomberg*, 501 F 2d 1379 (4th Cir. 1974); *Malone* v. *U.S.P.S.*, 526 F 2d 1099 (6th Cir. 1975).

In the case of an action against the employer alone, it is not required that, unlike the normal Section 301 LMRA situation, the breach of duty claim be reached and decided favorably to the employer before the action against the employer can be considered. *Czosek* v. *O'Mara*, 397 U.S. 25 (1970); *Neal* v. *U.S.P.S.*, 468 F.Supp. 968 (D.C. Utah 1979); *Lester* v. *U.S.P.S.*, 465 F.Supp. 545 (D.C. Ariz. 1979); Cf. *U.S.P.S., Inc.* v. *Mitchell*, 451 U.S. 56 (1981). Likewise, where an independent claim predicated upon an independent jurisdictional basis is asserted against the employer, whether joined with the union or proceeded against individually, the claim against the employer may be reached independent of the breach of duty claim of the union. It would be incongruous to hold otherwise.

U.P.S., Inc. v. *Mitchell, supra,* recognized that the claim against the employer is a contract claim. 451 U.S. at 62, 101 S.Ct. at 1564. *Mitchell,* however, was required to demonstrate a breach of the union's duty prior to reaching the contract claim because he based his claim against both the employer and union on Section 301 LMRA. 451 U.S. 62, 101 S.Ct. 1563. It was this sequential predicate which this Court found to equate to an action to vacate an arbitration award. 451 U.S. 62, 101 S.Ct. 1564. The state statute governing time limits for attacking arbitration awards was applied because of the failure of Congress to legislate a statute of limitations for Section 301 actions. 451 U.S. 60, 101 S.Ct. 1562.

The instant action differs materially from the situation presented to this Court in *Mitchell.* Unlike *Mitchell,* Petitioner's action against his employer, Respondent, U.S.P.S. was brought pursuant to 39 U.S.C. Section 409, not Section 301 LMRA, and an independent contract claim (Breach of collective bargaining agreement) was asserted against the Respondent, U.S.P.S. Thus, this claim can be considered directly and independently of the breach of duty claim against the union. Petitioner is not subjected to the sequential predicate which was fatal to *Mitchell,* and the action cannot be analogized as one to vacate an arbitration award. Moreover, Title 39 U.S.C. Section 409 expressly provides for application of Title 28, U.S.C., as that section governs time limitations for bringing suits in which the United States is a party. Since the claim asserted against the Respondent-Employer is a contract claim, and since Title 39 U.S.C. Section 409 requires application of Title 28, the pertinent limitation of actions period governing Petitioner's claims against Respondent, U.S.P.S., is six years, pursuant to 28 U.S.C. Section 2401 (a). (Appendix F) Cf. *Saffron* v. *Dept. of the Navy,* 561 F 2d 938 (D.C. Cir. 1977).[2]

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[2] Respondents argued below and the Appellate Court found (App. A) that the appropriate jurisdictional statute governing Petitioner's action against Respondent U.S.P.S. was Title 39 U.S.C. Section 1208.

II

THE RULE OF UNITED PARCEL SERVICE, INC. vs. MITCHELL, 451 U.S. 56, 101 S.CT. 1559 (1981), IS NOT PROPERLY APPLIED TO DISMISS AN EMPLOYEE'S ACTION AGAINST HIS UNION.

U.P.S., Inc., vs. *Mitchell, supra*, does not apply to dismiss an action by an employee against his union. 451 U.S. 56, 73, 101 S.Ct. 1559, 1569, Justice Stevens, Concurrence and Dissent. It is not possible to analogize such an action as one to vacate an arbitration award.

The decision of the Sixth Circuit Court of Appeals applied the same statute of limitations to the union as against the employer because of precedent in this Circuit requiring such application (Appendix A). *Badon* v. *General Motors Corp.*, 679 F 2d 93 (6th Cir. 1982). *Gallagher* v. *Chrysler Corp.*, 613 F 2d 167 (6th Cir. 1980).

This decision is at odds with a decision of the Fifth Circuit Court of Appeals in *Edwards* v. *Sea Land Service, Inc.*, 678 F 2d 1276 (5th Cir. 1982), holding that the same statute of limitations does not apply to the employer and union. This decision is also at odds with the holding of the Sixth Circuit in the cases relied on, as said cases only stated the same statute of limitations should "ordinarily" be applied.

(App. E). Such finding was incorrect, as Section 1208 applies, by its very terms, to actions between the Postal Service and a labor organization, or between labor organizations, 2 U.S. Code, Congressional and Administrative News – 1970, p. 3681, Section 229, subsection (b). (App. J). The finding was further incorrect in that 39 U.S.C. Sections 1201, et seq., incorporates only Sections 151-168 of Title 29, U.S.C. 2 U.S. Code, Congressional and Administrative News – 1970, p. 3679 (Applicability of the National Labor Relations Act) (App. K). Section 301, LMRA is therefore outside of its scope, as it is Section 185 of Title 29.

In any event, nowhere in Title 39, inclusive of Section 1208, is it otherwise specifically provided that other than Title 28 shall apply to govern limitations of action priods.

Moreover, for the reason set out heretofore, and because actions may be maintained separately and distinctly against the union and employer, or "joint actions" may assert separate, distinct and independent claims against the union and employer, as Petitioner herein has done, it is not compatible with the *Czosek* v. *O'Mara, supra,* decision of this Court to apply the same limitations period to both.

Further, this Court has found no overwhelming need for uniformity, once the dispute has exceeded the arbitration arena. *International Union, UAW* v. *Hoosier Cardinal, supra,* at 696.

III

THE RULE OF UNITED PARCEL SERVICE, INC. vs. MITCHELL, 451 U.S. 56, 101 S.CT. 1559 (1981), IS NOT PROPERLY APPLIED TO RETROACTIVELY DISMISS PETITIONER'S COMPLAINT AGAINST RESPONDENT.

The decision of this Court in *U.P.S., Inc.* v. *Mitchell, supra,* established a new principal of law in overruling clear past precedent in the Sixth Circuit, relied on by Petitioner in bringing said action.

Prior to this Court's *Mitchell* decision, the Sixth Circuit, in *Smart* v. *Ellis Trucking,* 580 F 2d 215, 219 (6th Cir. 1978), cert. denied, 440 U.S. 215 (1980), had held that it was inappropriate to apply the post arbitration relief statute to Section 301 actions. Further, in a prior proceeding decided by the U.S. District Court for the Southern District of Ohio, Western Division, that Court had found an action against the Postal Service Union to be governed by a six year limitations of action period. (Opinion of Judge David S. Porter, unreported *D'Andrea* v. *American Postal Workers Union, et al.* decision rendered January 8, 1980).

Second, as stated above, there is no labor policy dictating significant need for uniformity (or speedy resolution) once

these matters have exceeded the arbitration process and entered the realm of the court room. *International Union, UAW* v. *Hoosier CARDINAL, supra.*

Finally, the retroactive application of the rule of *U.P.S., Inc.* v. *Mitchell, supra,* at least in this Circuit based upon the status of the law at the time of the filing of Petitioner's action, constitutes a deprivation of due process of law in contravention of the Fifth Amendment to the United States Constitution. Cf. *Bouie* v. *City of Columbia,* 378 U.S. 352, 354 (1964).

CONCLUSION

For the reasons set forth herein, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 81-3722
81-3540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD LAWSON (81-3722),
Plaintiff-Appellant,

v.

TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL UNION 100,
Defendant-Appellee.

GEORGE S. LEACH (81-3540),
Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

and

LOCAL 43, NATIONAL ASSOCIATION OF LETTER CARRIERS, et al.,
Defendants-Appellees.

BOTH CASES ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed January 17, 1983

Before: KEITH and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

MERRITT, Circuit Judge, delivered the opinion of the Court, in which PECK, Senior Circuit Judge joined. KEITH, Circuit

Judge, (pp. 12-17) filed a separate opinion, concurring in part and dissenting in part.

MERRITT, Circuit Judge. In these two *Vaca* v. *Sipes*, 386 U.S. 171 (1967) type actions for unfair representation against unions under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), the essential questions on appeal are: (1) whether *United Parcel Service* v. *Mitchell*, 451 U.S. 56 (1981)[1] and *Badon* v. *General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), require that a 90-day Ohio limitations statute for actions to vacate arbitration awards be applied to malpractice-type actions against unions for unfair representation, as well as for actions for wrongful discharge against employers; and (2) whether *Mitchell* should be applied retroactively to cases pending when *Mitchell* was decided. We hold that *Mitchell* applies retroactively to pending cases and that under *Mitchell* and *Badon* the Ohio statute of limitations governing suits to vacate arbitration awards applies to unfair representation actions against unions as well as to wrongful discharge actions against employers.

I. FACTS

A. Appeal No. 81-3540

The record reflects that on August 22, 1978, appellant Leach entered the Cincinnati, Ohio Post Office while intoxicated and shouted obscenities about his supervisor and two postal security guards. On August 29, 1978, Leach was issued a Notice of Proposed Dismissal from the Postal Service for conduct unbecoming a postal employee, effective October 6, 1978. The August, 1978, incident was not Leach's first employment

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[1] *Mitchell* applies a 90-day state limitations statute governing actions to vacate arbitration awards as the federal limitations analogue for actions against employers for wrongful discharge. It does so on the policy ground that "one of the leading federal policies" in labor law is the need for "relatively rapid disposition of labor disputes." 451 U.S. at 63.

problem. His disciplinary record included several warnings and two lengthy suspensions for bad conduct.

Leach's last infraction before his discharge, based on conduct similar to that for which he was ultimately discharged, was the subject of a grievance settlement which reduced his suspension from twenty-eight days to fourteen days. An important element of that settlement was that Leach join and actively participate in the Postal Service's alcohol recovery program for alcoholics. Leach was notified in the settlement that he would be discharged should subsequent disciplinary action be necessary because of continued unsatisfactory job performance. When he thereafter caused a disturbance at work, while drunk, on August 27, 1978, he was discharged.

On September 21, 1978, the defendant postal unions filed a grievance on Leach's behalf asking that Leach be reinstated. The grievance was denied by the defendant Postal Service and was eventually certified for arbitration by the unions. On February 20, 1979, the grievance was heard by Arbitrator Alan Walt. On February 27, 1979, Arbitrator Walt issued his award denying Leach's grievance. In denying the grievance and thus upholding Leach's discharge, the arbitrator found significant Leach's "progressively worsening disciplinary history caused by alcoholism."

Leach's complaint against the employer and the union under § 301 was filed on October 6, 1980, more than 17 months after the Arbitrator's decision. District Judge Carl Rubin entered a final order dismissing the complaint against the postal service for wrongful discharge and against the unions for unfair representation under the 90-day Ohio limitations statute for actions to vacate arbitration awards, Ohio Rev. Code § 2791.13 (1976).

B. Appeal No. 81-3722

In October, 1976, plaintiff Lawson, employed in Ohio by the Mason & Dixon Lines, Inc. as a truck driver, was discharged. The defendant Local 100 was the employee collective

bargaining representative for the truck line. The company based the discharge on alleged dishonesty in connection with the cashing of two pay checks for the same work week. Plaintiff had gotten a duplicate check by stating that the original pay check had been lost or stolen; subsequently, both checks were cashed. Plaintiff filed a grievance under the collective bargaining agreement and the grievance was eventually assigned for hearing before the joint Conference or Committee on October 20, 1976. That Committee, composed of equal numbers of Union and employer representatives, upheld the discharge. A handwriting expert testified for the employer that the endorsements on both the checks were in the plaintiff's handwriting. Neither the Union nor the employee produced an expert witness.

After the discharge the plaintiff engaged private counsel who retained the services of a reputable handwriting expert. The expert concluded that both of the checks had not been endorsed by the plaintiff but on the contrary one bore a forged endorsement. When the Union was informed of this new evidence, an effort was made to reopen the arbitration. The arbitration was reopened and a hearing set for April 20, 1977. The plaintiff, dissatisfied with his prior union representation during the grievance and arbitration process insisted that he be represented at that stage only by his private counsel. As a result of a meeting with his counsel and the employer, the plaintiff was reinstated with full back pay based on the expert testimony obtained by private counsel.

The plaintiff sued the Union for unfair representation on June 16, 1977, more than 6 months following completion of the arbitration process. He alleged that the union had not properly represented him at the October 20, 1976, arbitration hearing and had failed to get plaintiff promptly reinstated when advised of the opinion of the new handwriting expert. District Judge Hogan dismissed the case as untimely under Ohio's 90-day limitations statute for vacation of arbitration awards, § 2711.13, Ohio Rev. Code (1976).

II. SAME LIMITATIONS STATUTE APPLIES TO BOTH THE WRONGFUL DISCHARGE AND THE UNFAIR REPRESENTATION CLAIMS

In both cases, the employee appeals the dismissal of the case against the union on limitation grounds, and in the postal case Leach appeals the dismissal of the employer as well. In both cases the alleged wrongful discharge was addressed in the collectively bargained grievance and arbitration process and a final decision was rendered. If *United Parcel Service* v. *Mitchell, supra,* is applied retroactively – a question we will address momentarily – it is clear that the action against the *employer* in the postal case was barred by Ohio's 90-day arbitration statute. That was the holding of *Mitchell.*

The narrow holding in *Mitchell* covers the wrongful discharge case against the employer but does not necessarily cover the unfair representation case against the union, as Justice Stevens points out in his concurring opinion in *Mitchell,* 451 U.S. at 71. Since *Mitchell,* however, this Court has clearly held in *Badon* v. *General Motors Corp., supra,* that "the *Mitchell* rule also applies to Badon's unfair representation claim" because the same statute of limitation should be applied to both branches of the labor dispute, 679 F.2d at 98. Judge Martin's opinion for the Court in *Badon* relied on *Gallagher* v. *Chrysler Corp.,* 613 F.2d 167, 168 (6th Cir. 1980), which states the policy of this Circuit that the same statute of limitations should apply to both wrongful discharge and unfair representation cases. Although, as Justice Stevens points out in his concurring opinion in *Mitchell,* the two causes of action conceptually are based on somewhat different theories, *Badon* and *Gallagher* are the law of this Circuit until overruled or reversed, and they require application of the same limitations statute to both types of actions – the wrongful discharge claim against the employer and the unfair representation claim against the union.[2]

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[2] Even under Justice Stevens' rationale, it would appear that the

III. RETROACTIVE APPLICATION OF MITCHELL

The rule of *Mitchell* should be applied retroactively to pending actions against employers and unions. The normal rule is that in civil cases a recent authoritative opinion interpreting the law should be applied to pending cases unless it represents a "clean break" with the past and unless in addition it would be fundamentally unfair or otherwise burdensome to so apply it, see *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971); *United States* v. *Johnson*, 102 S.Ct. 2579, 2579 n. 12, 2595 (1982).

As *Mitchell* makes clear, the law on the limitations question in § 301 wrongful discharge and unfair representation cases has been in a state of confusion for some time. This Circuit and other circuits, prior to *Mitchell*, had adopted various state statutes of limitations, depending on the pecularities of the limitations law of the state in question and the arguments of counsel in the particular case. Although *Smart* v. *Ellis Trucking Co., Inc.*, 580 F.2d 215, 219 (6th Cir. 1978) ("action for wrongful discharge is not in the nature of a motion to vacate or modify an arbitration award") had rejected as not applicable the Michigan statute of limitation for setting aside arbitration awards, we do not believe that *Mitchell* represents the kind of "clean break" with past precedent contemplated in *Chevron* and *Johnson, supra*. *Mitchell* was simply a "clarification," an attempt to impose a single policy and a single rule in a legally chaotic situation. *Mitchell* was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases. We do not think that a "clean break" occurs every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. To so hold would reverse the regular common law rule, applied in *Chevron* and

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6 month statute for unfair labor practices found in § 10(b) of the Act, 29 U.S.C. § 160(b) would bar the actions against the unions in both cases because neither were filed within 6 months.

Johnson, that we should not normally have one law for old cases and another law for new cases. We note also that both this Circuit and others have assumed that the *Mitchell* rule applies retroactively; see *Badon*, *supra*, and *Davidson* v. *Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981). *But see Singer* v. *Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981) (*Mitchell* not retroactive). *Compare Singer with Local 1020* v. *FMC Corp.*, 658 F.2d 1285, 1289-90 (9th Cir. 1981) (applying *Mitchell* retroactively).

IV. ADDITIONAL ISSUES IN LEACH CASE

In the postal case, *Leach* v. *United States Postal Service*, the plaintiff presents additional arguments that the Ohio limitations statute on arbitration awards should not apply. We now consider those arguments.

A. The Effect of the Postal Reorganization Statute

Leach asserts that *Mitchell* is inapplicable because his claim against the United States Postal Service "is not of the 'hybrid type' claim pursuant to § 301(a), LMRA, but is predicated upon an independent jurisdictional statute, 39 U.S.C. § 409(b), which is in fact subject to an existing limitation period contained in 28 U.S.C." (Appellant's Brief at 16). The time limitation which *Leach* suggests should be applied pursuant to 39 U.S.C. § 409(b), a provision of the Postal Reorganization Act adopted in 1970, is the general six year statute of limitations set forth in 28 U.S.C. § 2401(a) governing civil actions brought against the United States. Leach bases this argument on the fact that his "claim is a contract claim asserted independently against" the federal government. (Appellant's Brief at 18).

This argument is incorrect. Section 2401(a) is not the applicable limitations statute. The grievance-arbitration process in the Postal Service came into the law in the Postal Reorganization Act of 1970. In passing the Act, Congress created "an independent establishment of the executive branch of the

government of the United States," 39 U.S.C. § 201, whose labor relations are patterned after the private sector and to which the National Labor Relations Act applies, 39 U.S.C. § 1209. The national labor policy in favor of arbitration expressed in section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), is included in the Postal Reorganization Act. It authorized the collective bargaining parties to include "procedures culminating in binding third-party arbitration," 39 U.S.C. § 1206(b). To enforce the provisions of the collective bargaining agreement, Congress enacted 39 U.S.C. § 1208(b).

This Circuit and our sister circuits have uniformly held that 39 U.S.C. § 1208(b) is an analogue of Section 301(a) of the Labor Management Relations Act of 1957[3] and have consistently applied § 301 law to suits brought pursuant to 39 U.S.C. § 1208(b). *Malone* v. *United States Postal Service*, 526 F.2d 1099, 1103-1104 (6th Cir. 1975) (legislative intent of Postal Reorganization Act was to "bring postal labor relations within the same structure that exists for nationwide enterprise in the private sector"). *Accord, National Association of Letter Carriers, AFL-CIO* v. *United States Postal*

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[3] Section 1208(b) of the Postal Reorganization Act of 1970, 39 U.S.C. § 1208(b), provides as follows:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

Section 301 (a) of the Labor Management Relations Act of 1957 ("LMRA"), 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

Service, 590 F.2d 1171 (D.C. Cir. 1978); *Melendy* v. *United States Postal Service*, 589 F.2d 256 (7th Cir. 1978); *Winston* v. *United States Postal Service*, 585 F.2d 198 (7th Cir. 1978); *National Association of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 919 (2nd Cir. 1971).

Thus, since the courts have applied § 301 case law to Postal Service labor relations cases arising under 39 U.S.C. § 1208(b) and since it is from the § 301 case law that *Mitchell, supra,* arose, *Mitchell* is clearly applicable to Leach's action against the Postal Service.

B. Leach's Assertion That His First Amendment Speech Allegations Remove His Case From The Application of USP Is Without Merit.

Leach throws in the ergument that since the alleged reason for his discharge from the Postal Service involved "an instance of speech" (mainly obscenities) and since speech is protected under the First Amendment of the United States Constitution, his case should be removed "from the restrictive application of the *Mitchell* principle" (Appellant's Brief 18-19). The Postal Service's answer to this argument is well-taken: "While he makes these contentions, Leach refuses to recognize, as he did in his arbitration proceeding, that it was his alcoholism which caused the misconduct which led to his discharge". (Appellees Brief 17):

> "Moreover, even assuming *arguendo* that Leach's speech was protected by the First Amendment, he cites no case to support a conclusion that the statute of limitations in challenging his discharge is therefore extended. Carried to its logical conclusion, Leach's argument is that anyone who is discharged will be afforded a longer period within which to file suit if he exercises his right of free speech and shouts an obscenity as he leaves his workplace. Such an argument not only lacks support in the law, it defies common sense." (Appellee's Brief 18.)

C. Amendment of Answer to Assert Limitations Defense

The District Court did not err when it permitted defendants to amend their answers to assert the *Mitchell* statute of limitations defense. The scope of this Court's review of the District Court's decision to permit the Postal Service to amend its Answer is narrow. Review is limited to the question of whether the District Court abused its discretion in allowing the amendment. *Hayden* v. *Ford Motor Company*, 497 F.2d 1292 (6th Cir. 1974).

Rule 15(a) of the Federal Rules of Civil Procedure permits the amendment of pleadings. The Rule provides, in pertinent part, that:

> [A] party may amend his pleadings only by leave of court or by written consent of an adverse party; and *leave shall be freely given when justice so requires.* (emphasis added).

This Court, as well as others, has freely allowed the amendment of pleadings in the absence of substantial prejudice to the opposing party. *Estes* v. *Kentucky Utilities Co.*, 636 F.2d 1131 (6th Cir. 1980); *Hageman* v. *Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973); *Head* v. *Timken Roller Bearing*, 486 F.2d 870 (6th Cir. 1973). Our review of the record indicates that defendants asserted the *Mitchell* statute of limitations defense shortly after *Mitchell* was decided. We do not find present here the kind of prejudice that prevents amendment, and therefore we do not find that the District Court erred in permitting the amendment raising the limitations defense.

V. EQUITABLE TOLLING

Finally, the plaintiffs in both cases argue that general equitable considerations should appeal to the conscience of the Chancellor and should toll the running of the *Mitchell* statute of limitations. Their arguments here are similar to

their retroactivity arguments. They basically assert that the *Mitchell* rule even if applicable, comes as a surprise and that it is unjust to refuse to hear their claims. We have reviewed each record carefully seeking to find equitable considerations that would justify an exception to the Supreme Court policy of rapid settlement of labor disputes or would otherwise justify tolling. We do not find any such considerations present. Lawson's claim for damages is that the union failed to find, employ and present at the arbitration hearing a handwriting expert. Leach's basic claim is that the union failed to persuade his employer to give him another chance. Neither of these claims presents facts indicating bad faith or wrongdoing on the union's part or any other circumstances that compel the conscience of the Chancellor to extend, set aside or make an exception to the law.

Accordingly, the judgments of the District Courts in Appeal Nos. 81-3722 and 81-3540 are affirmed.

APENDIX B

JUDGMENT ENTRY

(Filed August 5, 1981).

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-1-80-526

GEORGE S. LEACH,

Plaintiff,

vs.

UNITED STATES POSTAL SERVICE, ET AL.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action herein is hereby DISMISSED and that the defendants recover their costs of action.

Dated at Cincinnati, Ohio, this 5th day of August, 1981.

JOHN D. LYTER
Clerk of Court

BY: /s/ REBECCA E. ANDERSON,
Deputy

DISTRICT COURT'S ORDER

(Filed August 5, 1981).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-80-526

GEORGE S. LEACH,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE, ET AL.,

Defendants.

ORDER

This matter is before the Court on defendants' motions for summary judgment and on plaintiff's motion for reconsideration of notation orders granting defendants leave to amend their answers to include a statute of limitations defense.

Background

Plaintiff was formerly employed as a letter carrier by defendant United States Postal Service (U.S.P.S.) in Cincinnati, Ohio. He was a member of Local 43 of the National Association of Letter Carriers. (N.A.L.C.). Both Local 43 and the national union, the current presidents of each, and various local and national supervisory personnel of U.S.P.S. are all named as defendants. In addition, the president of Local 43 at the time of the acts complained of is also included.

Plaintiff's complaint stems from the circumstances leading to his discharge on October 5, 1978, and from his subsequent

attempts to seek reinstatement through administrative proceedings. Those proceedings culminated in an arbitration hearing, in accordance with a national working agreement between the U.S.P.S. and N.A.L.C. By an arbitrator's award dated February 27, 1979, plaintiff's grievance was denied.

On October 6 1980, plaintiff filed his complaint, alleging causes of action against the U.S.P.S. and various supervisory personnel (the federal defendants) for their activities leading up to plaintiff's dismissal and against the local and national N.A.L.C. and the officers mentioned for breaching a duty of fair representation during the administrative proceedings.

Defendants have moved for summary judgment, arguing that, in light of the Supreme Court's holding in *United Parcel Service, Inc.* v. *Mitchell*, —— U.S. ——, 49 U.S.L.W., 4378 (April 20, 1981), the filing of plaintiff's complaint violated the appropriate state statute of limitations. Defendants also moved to amend their complaint to include statute of limitations as an affirmative defense. The latter motion was granted by notation order; plaintiff has asked for reconsideration and has submitted a memorandum in support. For the reasons set forth herein, such motion is DENIED.

Leave to Amend

Federal Rule of Civil Procedure 12(b) requires that "[e]very defense . . . be asserted in the responsive pleading," with certain exceptions not relevant here. Fed. R. Civ. P. 12(b). Rule 8(c) provides, "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations. . ." Fed. R. Civ. P. 8(c). In order for defendants to raise the statute of limitations in this case, it would ordinarily be necessary that they do so in their respective answers. This the federal defendants and local union defendants failed to do. However, their answers were filed prior to the Supreme Court's decision in *United Parcel Service, supra* which they now assert is dispositive of the statute of limitations question and establishes a basis for summary judgment in their favor. They have

therefore moved for leave to amend their answers to include this statute of limitations defense. Rule 15 deals with amended pleadings, and it states that "leave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

Plaintiff however, argues that the state rules of procedure control on the question of pleading amendment in order to include the statute of limitations defense, citing *Hayden* v. *Ford Motor Co.*, 497 F.2d 1292 (6th Cir. 1974), and *Estes* v. *Kentucky Utilities Co.*, 636 F.2d 1131 (6th Cir. 1980).

Plaintiff's reliance on these cases is misplaced. Both were diversity cases, requiring the District Court to apply substantive state law under the doctrine of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). If this were a diversity case, plaintiff's argument would merit serious consideration, given the holdings in *Hayden* and *Estes*. However, since jurisdiction in this case is not based on diversity of citizenship, plaintiff's argument is less persuative. Involved here are federal questions, requiring the application of federal law as well as federal procedure.[1]

Under Rule 15(a), there is broad discretion in determining when justice requires granting leave to amend. *Estes, supra*, at 1133. Leave to amend should be granted here, in order that the statute of limitations defense which may be dispositive of this case, may be raised. Plaintiff's motion for reconsideration of the notation orders is therefore DENIED.

Statute of Limitations

In addressing the statute of limitations issue, which is the basis for defendants' summary judgment motions, the Court must deal separately with the federal defendants and the union defendants in order to deal with the issues raised in the separate opinion, cited by plaintiff, of Justice Stevens in *Mitchell, supra*.

---

[1] While a state statute of limitations will be subsequently applied, it will be done so in the absence of an applicable federal law *Mitchell, supra* at 4379.

The test for summary judgment in this circuit is a stringent one. Federal Rule of Civil Procedure 56(c) permits a Court to grant summary judgment only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Tee-Pak, Inc.* v. *St. Regis Paper Co.*, 491 F.2d 1193, 1195 (6th Cir. 1974).

In deciding a motion for summary judgment, the Court must consider the evidence and all inferences to be drawn therefrom in the light most favorable to the party opposing the motion. *Smith* v. *Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979); *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.* 303 F.2d 425, 427 (6th Cir. 1962). Here, however, the material facts, i.e., the various dates involved, are not in dispute. The only question is whether the law requires granting defendants' motions for summary sudgment.

With regard to the federal defendants, the answer to that question must clearly be in the affirmative. *United Parcel Service, Inc.* v. *Mitchell* is controlling. Indeed, plaintiff does not dispute the applicability of the Supreme Court's ruling in *Mitchell* to the federal defendants, who stand in the same posture here as the U.P.S. in *Mitchell*.

Mitchell, like the case at bar, involved an employee's action against his employer and union under § 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a) (1976). In *Mitchell*, as here, the parties had proceeded through arbitration. The Joint Panel, which conducted the arbitration, denied the grievance, and the plaintiff filed suit some seventeen months later. The opening paragraphs of the Court's discussion of the statute of limitations issue are directly applicable to the case a bar:

> Congress has not enacted a statute of limitations governing actions brought pursuant to § 301 of the LMRA. As this Court pointed out in *International Union, UAW* v. *Hoosier Cardinal Corp.* 383 U.S. 696, 704-705 (1966), "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate

> state statute of limitations." Our present task is to determine which limitations period is "the most appropriate one provided by state law." This depends upon an examination of the nature of the federal claim and the federal policies involved.
>
> Although respondent did not style his suit as one to vacate the award of the Joint Panel, if he is successful the suit will have that direct effect. Respondent raises in his § 301 action the same claim that was raised before the Joint Panel-that he was discharged in violation of the collective-bargaining agreement. He seeks the same relief he sought before the Joint Panel-reinstatement with full backpay. In sum, "it is clear that [he] was dissatisfied with and simply seeks to upset the arbitrator's decision that the company did not wrongfully discharge him." 49 U.S.L.W. at 4379 (citations and footnotes omitted).

The Court went on to hold that the appropriate statute of limitations to be applied in *Mitchell* was the one relating to actions to vacate an arbitration award. That holding controls any decision with regard to the federal defendants. Ohio law must be examined to determine the time period within which actions to vacate an arbitration award may be brought.

Ohio Revised Code § 2711.13 (1976), provides that notice of a motion to vacate an arbitration award "must be served upon the adverse party . . . within three months after the award is delivered to the parties in interest . . ." Plaintiff's filing herein more than eighteen months after the arbitration award entitles federal defendants Bolger, Doran, Cooley, Caton, Lindsey, Lange and U.S.P.S. to judgment as a matter of law. Their motion for summary judgment is hereby GRANTED.

It is not equally clear that *Mitchell* is controlling with regard to the union defendants. As Justice Stevens pointed out in his separate opinion in that case, an opinion relied on heavily by plaintiff, only the employer in *Mitchell* sought review in the Supreme Court. 49 U.S.L.W. at 4382. Arguably, then, the Court's holding should be limited to suits against

employers. Indeed, the opening paragraph of the Court's opinion suggests such a limitation. *Id.* at 4378.

There is, however, law in this Circuit which compels the application of the same limitation period to actions brought under LMRA against an employee's union as are applied to related actions against his employer. United States Court of Appeals for the Sixth Circuit in *Gallagher* v. *Chrysler Corp.*, 613 F.2d 167 (6th Cir)., *cert denied*, —— U.S. ——, 101 S.Ct. 119 (1980), instructed clearly and directly: "We hold that, in an action against an employer and a Union under LMRA, the same statute of limitations ordinarily should apply as to both defendants. [citations omitted]." *Id.* at 169.

This Court is required both to apply the three-month limitation period with regard to the federal defendants, and to follow the holding in *Gallagher*. As a result, the three-month statute of limitations must be applied to the action against the union defendants. Upon doing so, the plaintiff's action is barred by the statute. Union defendants Sombrotto, Fisbeck, Strunck, and both Local 43 and national N.A.L.C. are entitled to judgment as a matter of law, and their motions for summary judgment are hereby GRANTED.

Summary

Based on the foregoing analysis and discussion, the Court holds as follows:

Plaintiff's motion for reconsideration of the notation orders is DENIED.

Federal defendants' motion for summary judgment is GRANTED.

Local union defendants' motion for summary judgment is GRANTED.

National union defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin, Chief Judge
United States District Court

APPENDIX C

[UNITED STATES CONSTITUTION]

RIGHTS OF PERSONS

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

39 USC § 409. Suits by and against the Postal Service

(a) Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28.

(b) Unless otherwise provided in this title, the provisions

of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States its officers, or employees are parties, and the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Pastal Service its officers, or employees are parties.

(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

(d) The Department of Justice shall furnish, under section 411 of this title, the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General the Postal Service may employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service or its officers or employees in matters affecting the Postal Service.

Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 725.

APPENDIX E

39 USC § 1208. Suits

(a) The courts of the United States shall have jurisdiction with respect to actions brought by the National Labor Relations Board under this chapter to the same extent that they have jurisdiction with respect to actions under title 29.

(b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

• • •

(d) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(e) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.
Pub.L. 91-375 Aug. 12, 1970, 84 Stat. 736.

APPENDIX F

28 USC § 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which is was presented.

As amended Nov. 1, 1978, Pub.L. 95-563, § 14(b), 92 Stat. 2389.

APPENDIX G

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29 USC § 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; equity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organizaton in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

• • •

APPENDIX H

COMPLAINT

(filed October 6, 1980)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. C-1-80-526

GEORGE S. BEACH
1061 Baymiller St., Apt. F
Cincinnati, Ohio 45203

Plaintiff

vs

UNITED STATES POSTAL SERVICE
c/o William Bolger
Postmaster General
Washington, D. C. 20260

and

WILLIAM BOLGER
Postmaster General
Washington, D. C. 20260

and

JOHN P. DORAN
Regional Postmaster General
United States Postal Service
Central Region
433 West Van Buren Street
Chicago, Illinois 60699

and

K. W. COOLEY
District Manager, United States
Postal Service
P. O. Box 29177
Columbus, Ohio 43229

and

CHARLES CATON
Local Postmaster General
Post Office Annex Station
1623 Dalton Street
Cincinnati, Ohio 45214

and

RICHARD LINDSEY
Station Manager
Post Office Annex Station
1623 Dalton Street
Cincinnati, Ohio 45214

and

WILLIAM J. LANGE
Manager, Station Branch Operations
United States Post Office
Cincinnati, Ohio 45234

and

NATIONAL ASSOCIATION OF LETTER CARRIERS
c/o Vincent Sombrotto
100 Independence Avenue, N.W.
Washington, D.C. 20001

and

VINCENT SOMBROTTO
President, National Association of Letter Carriers
100 Independence Avenue, N.W.
Washington, D.C. 20001

and

LOCAL 43, NATIONAL ASSOCIATION OF
LETTER CARRIERS
c/o Ed Fisbeck
517 W. Third Street
Cincinnati, Ohio 45202

and

ED FISBECK
President, Local 43, National Association of Lettercarriers
517 W. Third Street
Cincinnati, Ohio 45202

and

ED. STRUNCK, Union Steward
12 Juarez Court
Ft. Mitchell, Kentucky 41017

Defendants

JURISDICTION

1. This is an action brought by an employee wrongfully discharged from employment by his employer the United States Postal Service (hereafter U.S.P.S.), in violation of the collective bargaining agreement then in force.

2. This action also is being brought by an employee against his collective bargaining representative the National Association of Letter Carriers (hereafter "union"), and Local 43 of that organization, its agents, employees and servants, for failure of the union to fairly and lawfully to represent this employee in the various disciplinary actions and hearings against the said employee, all in violation of the unions duty of fair representation.

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (a), 28 U.S.C. §§ 1337 and 1339, 29 U.S.C. § 159 (a), 29 U.S.C. § 185 (a) (§ 301 (a) of the Labor Management Relations Act, June 23, 1947, c. 120, Title III, § 301, 61 Stats., 156, as amended), and 39 U.S.C. § 409 (a). Plaintiff seeks herein to redress rights secured to him by the First, Fifth, and Fourteenth Amendments to the United States Constitution.

PARTIES

4. Plaintiff, George S. Leach, is a citizen of the United States and currently resides at 1061 Baymiller Street, Apartment F, Cincinnati, Ohio, 45203. At all times complained of herein, Plaintiff was an employee of the Defendant U.S.P.S., employed as a level 5 letter carrier at the Post Office Annex Station, 1623 Dalton Street, Cincinnati, Ohio 45214; Plaintiff's duties involved the sorting and separating of different classes of mail, delivery thereof, and other duties incidental to the delivery of said mail; Plaintiff, at all times complained of herein, was a dues paying member of the N.A.L.C., Local 43; said union is a party to a national working agreement providing for collective bargaining between the union and the U.S.P.S.

5. Defendant, United States Postal Service, is an independent establishment of the United States Government's Executive Branch, created by an act of Congress, to wit: 39 U.S.C. § 201.

6. Defendant, William F. Bolger, is, and at all times herein mentioned, was the acting and duly appointed Postmaster General who, pursuant to 39 U.S.C. § 203, is vested with the management, conduct, and control of the administrative affairs of the U.S.P.S.

7. Defendants John P. Doran and K. W. Cooley are and at all times pertinent hereto were, respectively, the Regional Postmaster General and the District Manager of the U.S.P.S. of and for the region and district where the acts, omissions, and violations of which Plaintiff is aggrieved occurred.

8. Defendant, Charles Caton, is the Local Postmaster General of the U.S.P.S. of and for the region and district where the acts, omission, and violations of which Plaintiff is aggrieved occurred. At the time of the acts complained of herein Joseph J. Scanlon, now deceased, was the Local Postmaster.

9. Defendant, Richard Lindsey, is and at all times pertinent hereto was the Station Manager of the U.S.P.S. Post Office Annex Station located at 1623 Dalton Street, Cincinnati, Ohio, 45214, at which Plaintiff was employed. Defendant, Richard Lindsey, was the complainant who instituted the proceedings which culminated in Plaintiff's discharge from the U.S.P.S., as well as the Supervisor of Plaintiff at the Dalton Street Annex, and the hearing officer who presided at at least one of the meetings between Plaintiff, the union and managemennt concerning Plaintiff's discharge.

10. Defendant, William J. Lange, is, and at all times pertinent hereto, was, the manger of the U.S.P.S. Station and Branch Operations, of and for the region and district where the acts, omissions, and violations of which Plaintiff is aggrieved occurred.

11. Defendant, National Association of Letter Carriers, AFL-CIO, is an unincorporated association, maintaining its principal place of business at 100 Independence Avenue N.W.,

Washington, D.C. 20001, and at all times pertinent hereto, was and is a labor organization and the exclusive bargaining representative of certain employees of Defendant U.S.P.S., including Plaintiff, charged with providing fair, adequate and lawful representation of all members of said union and other employees of said U.S.P.S. in all disciplinary proceedings between said union members and other employees and the U.S.P.S.

12. Defendant, Vincent Sombrotto, is the present president of the N.A.L.C. AFL-CIO.

13. Defendant, Local 43 of the Defendant N.A.L.C. AFL-CIO, is an unincorporated association, maintaining its principal place of business at 517 West Third Street, Cincinnati, Ohio 45202, and at all time pertinent hereto, was and is a labor organization and the exclusive bargaining representative of certain employees of Defendant U.S.P.S., including Plaintiff, charged with providing fair, adequate and lawful representation of all members of said union and other employees of said U.S.P.S. in all disciplinary proceedings between said union members and other employees and the U.S.P.S.

1. Defendant, Ed Fisbeck, is the current president of Local 43 of the N.A.L.C. AFL-CIO.

15. Defendant, Ed Strunck, was the President of Local 43 of the N.A.L.C. AFL-CIO, and Plaintiff's local representative in the disciplinary proceedings mentioned hereafter, at the times of the acts, omissions and violations complained of herein.

All of the above named defendants and their employees, agents, and/or servants were acting within the scope of their authorized duties and powers at all times hereafter mentioned.

FIRST COUNT

STATEMENT OF THE CASE

16. Plaintiff was employed as a mail clerk with the U.S.P.S. during the years of 1956 and 1957, and as a veteran's preference employee from the year 1959 until his date of discharge on October 6, 1978. During the latter period he was employed as a level 5 letter carrier at the U.S.P.S. Post Office Annex Station at 1623 Dalton Street, Cincinnati, Ohio 45214. At all times mentioned herein and pertinent hereto he was a current dues paying member of Local 43 of the N.A.L.C. AFL-CIO.

17. Plaintiff states that during the first seventeen years of his service with U.S.P.S., or from 1956 to 1957 and from 1959 to 1976, Plaintiff's record with the U.S.P.S. was immaculate and free of any blemishes whatsoever, whether disciplinary or otherwise.

18. Plaintiff further states that on or about the year 1976 or 1977 that Defendant Lindsey was promoted to Station Manager and Supervisor of the U.S.P.S. Post Office Annex Station at 1623 Dalton Street, Cincinnati, Ohio 45214 (hereafter "annex"). Subsequent to Defendant Lindsey assuming said position Plaintiff was subjected to numerous disciplinary measures, including but not limited to letters of warning, suspensions, reprimands and finally the discharge complained of herein, as set out below.

19. On or about October 18, 1976, Plaintiff reported for work as usual to his normal station at the Dalton Street Annex. On this date and as he had on all working days for the previous approximately fourteen years Plaintiff covered his assigned route, consisting of the geographic area delineated by the "relay" points of 304 West McMicken Street, 469 West McMicken Street, The intersection of the streets of Klotter and Baymiller, and the intersection of the streets of Findlay and Baymiller. Because of the inherent transient and chang-

ing character of the areas and its population as it then existed and as it existed at all times relevant to the allegations contained herein and because of certain conditions which normally exist and affect the deliverability of items of mail, Plaintiff returned with certain items of mail which had not been delivered.

20. Upon Plaintiff's return to the Dalton Annex with said undeliverable mail, Plaintiff's Supervisor, Ed Jacobs, at Defendant Lindsey's behest, caused Plaintiff's undeliverable mail to be counted and itemized, an extremely uncommon and unheard of procedure within the Postal Service, even though returns are a natural occurrence on every route, but especially on Plaintiff's route, facts of which both Supervisor's were aware or should have been aware. Based upon this count and itemization, a letter of warning was issued with the threat of further disciplinary action should a like incident occur.

21. On Saturday, February 26, 1977, Plaintiff suffered an injury while engaged in the delivery of mail on his assigned route. Plaintiff informed the Dalton Annex by placing a telephone call to the annex station with regard to his injury, that due to his injury he would be unable to complete his route or would take longer than his normal time in completing said route. Plaintiff continued delivery of said route, but because of his injury, exceeded his normal time in so doing and "cut" certain portions of the route which would have required him to climb a high number of steps to deliver said mail. Plaintiff returned to the annex with mail which was undeliverable due to normal existing conditions affecting his route and other routes and due to mail which was undeliverable due to the work incurred injury. The majority of the deliveries on said route were completed, however.

22. On March 9, 1977, a notice of suspension was issued to and imposed upon Palintiff as a result of the mail returned on February 26, 1977. Said Notice was signed by Supervisor Edward E. Jacobs, and was issued at Defendant's Lindsey's

behest, and was issued even though Plaintiff's injury was reported to the Dalton Annex, and even though normally existing conditions prevented the delivery of certain items of the mail.

23. On or about March 1, 1977, Palintiff requested "at least three days or four days, or possibly more" days of personal leave to attend the funeral of a relative in Birmingham, Alabama. Plaintiff's Supervisor Gary Kaiser granted said leave to Plaintiff, stating that he should take the time that was needed, but that if it was to exceed more than the five days, to call the annex and inform them of such. Plaintiff did not report to work for the period of March 1, 1977 to and inclusive of March 5, 1977.

24. Upon Plaintiff's return, Plaintiff was served with a letter of warning signed by Gary Kaiser, but issued at Defendant Lindsey's request or approval, even though Plaintiff had obtained the requisite approval for said leave and informed his employer of such.

25. On or about Saturday, May 28, 1977, Plaintiff completed his route and assigned deliveries and returned to the annex with the normal amount of undeliverable mail, which mail was undeliverable due to the nature of his route and due to normal circumstances affecting deliverability of mail in general. Due to an oversight, Plaintiff failed to remove said mail from the jeep assigned to him, and said mail was discovered and turned into the annex apparently by a security guard.

26. On June 30, 1977, nearly one month later, a notice of suspension was issued to Plaintiff, signed by Supervisor Edward E. Jacobs, but issued at Defendant Lindsey's behest or approval, suspending Plaintiff for a period of twenty eight days, even though Defendant Lindsey was aware of or should have been aware of the nature of Plaintiff's assigned route and the normal existing conditions preventing delivery of certain items of mail.

27. On October 14, 1977, Plaintiff reported for work at his usual time and place. Upon his return from his assigned route at approximately four o'clock P.M. that afternoon, and upon entering the annex station, Plaintiff and another carrier exchanged a customary and friendly call of greeting. Plaintiff then dropped his mail bag at his desk, placed the collected mail in its depositry, picked up the following days mail and placed it on his desk for sorting, separated the undeliverable mail and placed it in its proper place within the annex, and turned in his keys and money from C.O.D.'s and placed the undeliverable signature mail and packages in their proper place. At this time Plaintiff was approached by Defendant Lindsey and a Security Guard. Defendant Lindsey instructed the guard that Plaintiff was loud and boisterous and that the guard should escort the Plaintiff from the premises. The guard requested time to retrieve his "night Stick" for purposes of escorting the Plaintiff from the premises, and Plaintiff stated to the guard "Do You think I am a fool? If you want me to leave, wait a minute and we'll leave together." Thereafter, Plaintiff left the premises.

28. Subsequently on October 21, 1977, a twenty eight day notice of suspension was imposed upon the Plaintiff by notice signed by Defendant Lindsey and issued at his complaint.

29. Plaintiff, through his union, filed a grievance pursuant to Article XV of the 1975 Agreement between the union and the U.S.P.S. A "Step One" meeting under said agreement was held on October 28, 1977, between the Employer and the grievant and his union. Plaintiff was represented at said meeting by an agent, servant or employee of the Defendant Local 43 of the N.A.L.C. AFL-CIO by Union Steward Ernest Vanover, and the U.S.P.S. was represented by the complainant supervisor Defendant Richard Lindsey.

30. As a result of this meeting a settlement was reached reducing the suspension to fourteen days, but obligating the Plaintiff to "actively participate in the Postal Services "PAR"

program," authorized under XXXV of the 1975 Agreement between the U.S.P.S. and the union. Said settlement also provided that "Failure by you to seek self help will result in your removal from the Postal Service should further disciplinary action be necessary because of continued unsatisfactory job performance." (See Exhibit A, attached hereto.)

31. On August 22, 1978, plaintiff reported for work as usual to the annex. Upon completion of his mail delivery route Plaintiff, as customary, returned to the annex station to clock in and deposit any remaining mail and his Postal Service Equipment. Upon entering the annex Plaintiff exclaimed "Hey, Hey, hey, what a beautiful day," or a similar exclamation to that effect. At that time Plaintiff observed a U.S.P.S. clerk in the vicinity, and as it was his usual habit to do, exchanged a greeting with him. The postal clerk remarked to Plaintiff "Your little buddy is around here somewhere." Plaintiff inquired "Who?" and was told in reply that the clerk was referring to Defendant Lindsey. Plaintiff responded in a casual and normal tone of voice directed to the clerk, "Fuck that little punk." At no time was Plaintiff derogatory in his remarks nor did he direct said remark to Defendant Lindsey. Plaintiff engaged in no conduct which could be considered insubordinate, was not unduly loud or boisterous, and was not intoxicated nor had he consumed any alcohol that day. At no time was Defendant Lindsey visible to Plaintiff, nor did Defendant Lindsey or any other U.S.P.S. employee at that time confront Plaintiff with regard to such remarks. At no time did any guard or Defendant Lindsey approach any closer than approximately forty-five feet to Plaintiff.

32. Approximately seven days later, or on or about August 29, 1978, Plaintiff was served with a notice of proposed dismissal from the Postal Service, signed by Defendant Lindsey as his Supervisor and complainant. Such notice was served in Accordance with section 1 of Article XVI of the Agreement entered into between the U.S.P.S. and the union on

July 21, 1978. The basis for said proposed dismissal was for conduct unbecoming a postal employee.

33. On or about August 30, 1978, plaintiff filed a grievance, as authorized under Article XV of the 1976 Agreement between the U.S.P.S. and the union as made applicable to the procedure by Article XV of the 1978 Agreement between the U.S.P.S. and union. A "step one" meeting was subsequently held between Plaintiff and the U.S.P.S. Plaintiff was represented by Mr. Ed Fisbeck, union steward and employee, agent or servant of Local 43 of the N.A.L.C. AFL-CIO. The. U.S.P.S was represented at this time by Supervisor Mr. Edward F. Jacobs.

34. At or about this time, or shortly thereafter the union established the position that it was to Plaintiff's benefit to admit to the charges rather than to contest them, and to seek job or craft transfer within the U.S.P.S. and to submit to active participation in the Postal Services' "PAR" Program.

35. On or about September 18, 1978, a decision was rendered by the employer denying said grievance.

36. A second hearing was conducted with regard to the proposed disciplinary action on or about September 26, 1978. Plaintiff was represented again at this hearing by Mr. Ed Fisbeck. At this time the employer was represented by Defendant Lindsey. By written response dated October 4, 1978, and signed by Defendant complainant-supervisor Lindsey, the grievance was again denied.

37. By letter dated on or about October 5, 1978, and signed by U.S.P.S. employee, agent or servant acting within the scope of his authorized duties, William J. Lange, Manager, Station Branch operations of the Dalton Annex, Plaintiff was officially discharged from the employ of the U.S.P.S.

38. Plaintiff exhausted his administrative remedies as provided under the applicable Articles of the 1975 Agreement between the U.S.P.S. and the union up to and through Arbi-

tration. At each step and including the Arbitration decision the grievance was denied and the discharge affirmed.

39. Plaintiff states that the actions of the U.S.P.S. by and through its employees, agents and or servants were conducted in bad faith, were malicious and unfounded, and were calculated to and intended to punish and harass Plaintiff, and were calculated and intended to result in Plaintiffs discharge, and in fact did so result.

40. Plaintiff further states that the actions of Defendant U.S.P.S. by and through his employees, agents and or servants resulted in the termination of Plaintiff employment with the U.S.P.S., violated the Plaintiff's First Amendment right to free Speech under the United States Constitution, and to Due Process of Law under the Fifth Amendment to the United States Constitution, and that these actions were intended to and did in fact punish Plaintiff for the exercise of that right.

41. Plaintiff further states that said actions of the Defendant U.S.P.S. by and through its employees, agents and or servants represented a blatant violation of the provisions of the pertinent sections of the 1975 and 1978 Agreements between the U.S.P.S. and the union, and all other agreements, understandings and standards of conduct governing employee conduct, then existing.

42. The action of the U.S.P.S. by and through its agents, employees and or servants resulted in immediate, irreparable and continuing harm to Plaintiff for the remedy of which there exists no adequate remedy at law.

SECOND COUNT

43. Plaintiff incorporates by reference all of the pertinent allegations of paragraphs one through forty-one as above.

44. Plaintiff states that prior to the grievance and arbitration meetings and hearings as set out above in paragraphs

thirty-one to forty-one, it was Plaintiffs desire to contest the basis of the Proposed Dismissal, said intent was made known to the union and it's employee's, agents and or servants representing him. Contrary to Plaintiff's wishes, Defendant union compromised the rights of Plaintiff by, among other things, admitting to the fact of intoxication, to the existence of a drinking problem, and seeking job or craft transfer and "PAR" participation in settlement.

45. Plaintiff further states that prior to the arbitration procedure itself plaintiff made several attempts to meet with Defendant Ed Strunck to discuss the arbitration hearing and the facts of his discharge. In each attempt he was rebuffed and instructed that "he should not worry, that everything would be all right." Plaintiff states that he did not actually meet with Defendant Ed Strunck with regard to the arbitration hearing until the day of the hearing and shortly before the time of said hearing, even though Plaintiff attempted to arrange such a meeting prior to the date of the hearing.

46. Plaintiff states that in furtherance of arranging said meeting several phone calls were placed to Defendant Strunck's office, but to Plaintiff's knowledge, these calls were never returned, and that even though Defendant Strunck had knowledge of Plaintiff's whereabouts, no contact was ever made with Plaintiff concerning said hearing.

47. Plaintiff states that prior to the arbitration hearing and during the grievance procedure that Defendant union, by and through its employee's, agents and or servants caused and advised Plaintiff to admit to a drinking problem and the fact of intoxication.

48. Plaintiff states that at the arbitration hearing itself, that Defendant union, by and through its employee, agent and or servant, Defendant Ed Strunck, caused Plaintiff to admit to the fact of alcoholism and or a drinking problem, to the fact of intoxication, and further failed to present any exculpatory evidence or witnesses on Plaintiff's behalf, and contrary to

Plaintiff's instructions failed to raise the question of Plaintiff's protected speech.

49. Plaintiff states that in entering into the settlement agreement as set out in paragraph 30 of this complaint (see attached exhibit A), Defendant union, through its employees, agents and or servants, negligently, arbitrarily, capriciously, in bad faith and outrageously compromised Plaintiff's rights to continued employment, and in entering into said agreement on Plaintiff's behalf contributed to Plaintiff's ultimate discharge from employment with the U.S.P.S., and that in so doing breached their duty of Fair Representation due and owing to Plaintiff.

50. Plaintiff further states that in doing the things complained of in paragraphs numbered forty-two through forty-eight, the Defendant union, by and through its employees, agents and or servants, who were at all times acting within the authorized scope of their employment, agency or as servants, contributed to Plaintiff's ultimate discharge from employment with the U.S.P.S., and that by doing those things complained of breached their duty of fair representation due and owing to Plaintiff.

51. That by doing the things complained of as set out in paragraphs numbered 30, and paragraphs numbered forty-three through forty-nine, by and through its employees, agents and or servants, the union breached the terms of the pertinent sections of the Agreements entered into on behalf of its members and employees of the U.S.P.S., and between the union and the U.S.P.S., as made applicable by the 1975 and 1978 Agreements to the duty of the union to its members.

52. Further, that by doing the things complained of as set out in paragraphs thirty and forty-three through forty-nine, the union, by and through its employees, agents and or servants caused the Plaintiff to suffer great immediate, irreparable and continuing harm for which there exists no adequate remedy at law.

WHEREFORE, Plaintiff, George S. Leach, respectfully requests that this Court render judgment as follows:

1. Issue both a preliminary and permanent injunction reinstating Plaintiff to his former position as letter carrier, level five, at the rate of pay which he did enjoy had the discharge not occurred subject to and in accordance with the corresponding status, rights, privileges, benefits and responsibilities which he enjoyed prior to said discharge, pending the outcome of this action.

2. Order the Defendants U.S.P.S. and union to specifically perform the contracts existing between the Defendant U.S.P.S. and the Plaintiff, between the Defendant U.S.P.S. and the Defendant union, and between the Defendant union and the Plaintiff.

3. To order reinstatement of the Plaintiff to his position as letter carrier, level five, with the U.S.P.S., together with back pay based upon the rate of pay to which he was entitled at that time and together with any increases which he would have realized had the discharge not occurred, with interest on said amount calculated at the rate of 6%, subject to and in accordance with the status, rights, privileges, benefits and responsibilities which he now would enjoy had the discharge not occurred, including, but not limited to retirement benefits, hospitalizatiion benefits and the like; and an adequate amount of compensation for those rights, privileges, benefits and responsibilities of which Plaintiff was deprived as a result of the discharge; all against the Defendants U.S.P.S. and union both jointly and severally.

4. Render Judgment against both the Defendants Union and U.S.P.S. for an amount of damages sufficient to compensate Plaintiff for his discharge from employment arising from the Defendants U.S.P.S. and union's bad faith, arbitrary, capricious and outrageous and negligent conduct in the proceedings which culminated in Plaintiff's dismissal.

5. Render punitive damages against the Defendant U.S.P.S. for the bad faith and malicious conduct of it's employee's, agents and or servants in taking those actions which cumulatively resulted in Plaintiff's discharge from employment, for $100,000.00.

6. Award Plaintiff reasonable attorneys' fees; costs expended herein; and such other relief at law and in equity to which the Court finds the Plaintiff to be entitled.

Judgment is requested against the above named defendants both jointly and severally under each count of the Complaint.

Respectfully Submitted,

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APPENDIX I

[39 USC § 409]

Section 111—General Powers of the Postal Service.—This section grants the following general powers to the Postal Service:

(1) To sue and be sued in its own name;

* * *

Section 113—Suits by and Against the Postal Service.—This section details procedures for suits to which the Authority is a party.

Subsection (a).—The United States District Courts are given original nonexclusive jurisdiction over suits by or against the Postal Service, and actions against the Postal Service in State courts may be removed to the Federal courts.

Subsection (b).—Service of process, venue, and limitations shall be as provided in title 28 for the United States, its officers or employees, and the rules of procedure adopted under title 28 shall apply to the Postal Service, its officers or employees in like manner as to the United States courts may be removed to the Federal courts.

* * *

APPENDIX J

[39 USC § 1208]

Section 229—Suits.—

Subsection (a).—Provides for court jurisdiction of National Labor Relations Board actions under this title to the same extent as under title 29, United States Code.

Subsection (b).—Provides for suits between the Postal Service and labor organizations, or between labor organizations, in the United States District Courts having jurisdiction of the parties, regardless of the amount in controversy.

Subsection (c).—Provides that the Postal Service and labor organizations shall be bound by the authorized acts of their agents, and for suits by or against labor organizations as an entity. Any money judgments against a labor organization are limited to execution only against the organization as an entity and its assets.

Subsection (d).—Provides jurisdictional criteria for actions by or against labor organizations.

Subsection (e).—Provides that service of judicial process upon an officer or agent of a labor organization shall constitute service upon the organization.

* * *

APPENDIX K

Section 222—Applicability of the National Labor Relations Act.—Labor-management relations are, to the extent not inconsistent with this title, subject to Subchapter II of the National Labor Relations Act, as amended (Title 29 United States Code, Sections 151-168). The strike ban is retained by virtue of § 114(1) and (2) of title 39.

No. 82-1667

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE S. LEACH, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES POSTAL SERVICE IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's suit alleging that his employer breached its collective bargaining agreement and his union breached its duty of fair representation was barred by the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 698 F.2d 250. The order of the district court (Pet. App. 13a-18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1983. The petition for a writ of certiorari was filed on April 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 22, 1978, petitioner, then an employee of respondent Postal Service, "entered the Cincinnati, Ohio Post Office while intoxicated and shouted obscenities about his supervisor and two postal security guards" (Pet. App. 2a). One week later he was issued a notice of proposed dismissal for conduct unbecoming a postal employee, effective October 6, 1978 (*ibid.*).

On September 21, 1978, respondent unions filed a grievance on petitioner's behalf seeking his reinstatement (Pet. App. 3a). The Postal Service denied the grievance, and the unions certified the grievance for arbitration. An arbitrator heard the grievance on February 20, 1979, and issued an award adverse to petitioner on February 27, 1979 (*ibid.*). In upholding the Postal Service's discharge of petitioner, "the arbitrator found significant [petitioner's] 'progressively worsening disciplinary history caused by alcoholism' " (*ibid.*).[1]

2. On October 6, 1980, more than 19 months after the arbitrator's decision, petitioner brought this action against respondents in the United States District Court for the Southern District of Ohio. Pet. App. 3a, 23a-29a. Petitioner alleged that the Postal Ser-

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[1] Petitioner's disciplinary record included several warnings and two lengthy suspensions for misconduct. The most recent incident prior to the one on August 22, 1978, involved conduct similar to that for which petitioner was discharged, and was the subject of a grievance settlement that reduced a suspension from 28 to 14 days. Pet. App. 3a. The settlement also required petitioner to participate in the Postal Service's alcohol recovery program and advised him that he would be discharged if further disciplinary action were necessary because of "continued unsatisfactory job performance" (*ibid.*).

vice had discharged him in violation of the applicable collective bargaining agreement (*id.* at 25a, 29a-35a),[2] and that the unions had violated their duty of fair representation by their handling of the grievance and arbitration proceedings (*id.* at 26a, 35a-37a). Petitioner invoked the district court's jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. 185(a) ("LMRA"), as well as 28 U.S.C. 1331(a) and 1339, 28 U.S.C. (Supp. V) 1337, 29 U.S.C. 159(a) and 39 U.S.C. 409(a). Pet. App. 26a.

On respondents' motions for summary judgment, the district court held (Pet. App. 16a-18a) that petitioner's action was time-barred. With respect to petitioner's action against the Postal Service, the court concluded (and petitioner did not dispute (*id.* at 16a)) that this Court's decision in *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), was controlling.[3] Accordingly, the court held that petitioner's action against the Postal Service was barred by Ohio's three-month statute of limitations for actions to vacate an arbitration award, Ohio Rev. Code § 2711.13 (Page 1981). Although the district court noted (Pet. App. 17a) that, in view of Justice Stevens' separate opinion in *Mitchell*, "[i]t is not equally clear that *Mitchell* is controlling with regard to the union

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[2] Petitioner also claimed (Pet. App. 35a) that his discharge was intended as a punishment for his alleged exercise of the First Amendment right to free speech and constituted a violation of that right.

[3] In *Mitchell*, the Court held that the most appropriate state statute of limitations to apply to an employee's Section 301 action against his employer challenging a discharge that was upheld in arbitration was the limitations period for actions to vacate an arbitration award. In that case the applicable New York state statute provided a 90-day limitations period.

defendants," the court concluded (Pet. App. 18a) that Sixth Circuit precedent "compels the application of the same limitation period to actions brought under LMRA against an employee's union as are applied to related actions against his employer." Accordingly, the district court granted the motions for summary judgment of both the employer and union respondents.

3. The court of appeals affirmed (Pet. App. 1a-11a), agreeing with the district court that petitioner's claim against the Postal Service for wrongful discharge constituted a challenge to a final arbitration decision that was indistinguishable from the one involved in *Mitchell*. The court rejected petitioner's contention that his claim against the Postal Service was "not of the 'hybrid-type' claim pursuant to § 301 (a), LMRA," but rather was based on 39 U.S.C. 409(b), and therefore was controlled by the general six-year statute of limitations governing civil actions against the United States contained in 28 U.S.C. (Supp. V) 2401(a).[4] The court explained (Pet. App. 7a-9a) that in passing the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, Congress had patterned the Postal Service's labor relations after labor relations in the private sector under the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.* In particular, the court noted (Pet. App. 8a) that 39 U.S.C.

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[4] 39 U.S.C. 409(b) provides:

> Unless otherwise provided in this title, the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, and the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

1208(b) provides for the enforcement of collective bargaining agreements in federal court. Moreover, the court explained (Pet. App. 8a; footnote omitted):

> This Circuit and our sister circuits have uniformly held that 39 U.S.C. § 1208(b) is an analogue of Section 301(a) of the Labor Management Relations Act of 1957 [*sic*] and have consistently applied § 301 law to suits brought pursuant to 39 U.S.C. § 1208(b).

Accordingly, the court concluded (Pet. App. 9a), "since the courts have applied § 301 case law to Postal Service labor relations cases arising under 39 U.S.C. § 1208(b) and since it is from the § 301 case law that *Mitchell*, *supra*, arose, *Mitchell* is clearly applicable to [petitioner's] action against the Postal Service."[5]

The court of appeals also agreed with the district court (Pet. App. 5a) that while *Mitchell* "does not necessarily cover the unfair representation case against the union," under the law of the Sixth Circuit "the same statute of limitations should be applied to both branches of the labor dispute." See *Badon* v. *General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982); *Gallagher* v. *Chrysler Corp.*, 613 F.2d 167 (6th Cir.), cert. denied, 449 U.S. 841 (1980).

Finally, the court of appeals held (Pet. App. 6a-7a) that *Mitchell* applied retroactively to petitioner's case, which was pending at the time this Court de-

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[5] The court of appeals also rejected petitioner's claim that his discharge was in retaliation for his lawful exercise of First Amendment rights (Pet. App. 9a). Rather, the court agreed with the Postal Service that petitioner was discharged because of misconduct that resulted from his alcoholism and that, in any event, the reason for petitioner's discharge would not affect the applicable statute of limitations (*ibid.*).

cided *Mitchell*. The court noted (Pet. App. 6a) that it "and other circuits, prior to *Mitchell*, had adopted various state statutes of limitations, depending on the peculiarities of the limitations law of the state in question and the arguments of counsel in the particular case." It characterized *Mitchell* as "simply a 'clarification,' an attempt to impose a single policy and a single rule in a legally chaotic situation" (Pet. App. 6a). In the court's view, "*Mitchell* was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases" (*ibid.*). Accordingly, relying on this Court's decision in *United States* v. *Johnson*, No. 80-1608 (June 21, 1982), and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court of appeals concluded (Pet. App. 6a) that *Mitchell* did not represent "a 'clean break' with the past" and that its retroactive application to petitioner's case would not be "fundamentally unfair or otherwise burdensome."

ARGUMENT

1. On June 8, 1983, subsequent to the filing of the petition for a writ of certiorari, this Court rendered its decision in *DelCostello* v. *International Brotherhood of Teamsters*, No. 81-2386. That case presented two questions not decided in *United Parcel Service, Inc.* v. *Mitchell*, *supra*: (1) whether, with respect to an employee's action against his employer for breach of a collective bargaining agreement, Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), is more appropriate than any state statute of limitations, and (2) what statute of limitations should govern the employee's action against his union for breach of the duty of fair representation. The Court concluded that Section 10(b) "should be the

applicable statute of limitations governing that suit, both against the employer and against the union." *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, slip op. 2.

DelCostello is completely dispositive of this case. As *DelCostello* makes clear, this action is governed by the six-month statute of limitations contained in 29 U.S.C. 160(b). Since petitioner did not bring suit until more than 19 months after the arbitrator's decision, his claim is time-barred.

Contrary to petitioner's assertion (Pet. 6), there is no difference of substance between his action and "the usual situation involving an action by a discharged employee against his union and employer * * * commonly characterized as a 'hybrid Section 301-breach of duty action.' " Rather, this case, like *Vaca* v. *Sipes*, 386 U.S. 171 (1967), *Hines* v *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), *Bowen* v. *United States Postal Service*, No. 81-525 (Jan. 11, 1983), and *DelCostello*, involves an action by an employee against his employer and union, claiming that the employer breached a provision of the collective bargaining agreement and that the union breached its duty of fair representation by its mishandling of the ensuing grievance and arbitration proceedings.

The fact that petitioner's employer was the Postal Service, rather than a private entity, does not affect the applicability of the rule announced in *DelCostello*. As the court of appeals recognized (Pet. App. 8a), Congress patterned the Postal Service's labor relations after labor relations in the private sector. See H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 13-14 (1970). Thus, while postal employees, like other federal employees, cannot strike, the Postal Reorgani-

zation Act provides for binding third-party arbitration of labor disputes (see 39 U.S.C. 1207; H.R. Rep. No. 91-1104, *supra*, at 10, 14-15; S. Rep. No. 91-912, 91st Cong., 2d Sess. 7 (1970)), and for federal court enforcement of collective bargaining agreements (39 U.S.C. 1208(b)). As Justice White noted in *Bowen* v. *United States Postal Service*, *supra*, slip op. 2. n.2 (concurring in part and dissenting in part), an action by a former employee against the Postal Service, as employer, for wrongful discharge, and against the union for breach of the duty of fair representation "technically arises under § 1208(b) of the Postal Reorganization Act, 39 U.S.C § 1208(b), which is identical to § 301 [of the Labor Management Relations Act, 29 U.S.C 185] in all relevant aspects." Since *DelCostello* arose from Section 301 case law, it clearly is applicable to petitioner's action against the Postal Service. See Pet. App. 8a-9a.

Petitioner thus errs in suggesting (Pet. 5-8) that because 39 U.S.C. 409 is *one* source of federal court jurisdiction over suits against the Postal Service, it is the appropriate source of jurisdiction over suits seeking the enforcement of collective bargaining agreements and that therefore, by virtue of 39 U.S.C. 409(b) (see note 4, *supra*), the general six-year statute of limitations applicable to civil actions against the United States controls. Whereas Section 409(a) deals with "all actions brought by or against the Postal Service," 39 U.S.C. 1208(b) is specifically concerned with "suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations."[6] Applying the well set-

[6] Petitioner's contention (Pet. 9 n.2) that 39 U.S.C. 1208(b) cannot be the governing jurisdictional statute because it

tled principle that the more specific provision governs, it is clear that 39 U.S.C. 1208(b) controls suits by Postal Service employees alleging a violation of the collective bargaining agreement. In any event, since Congress clearly intended that a postal employee's rights against the Postal Service under 39 U.S.C. 1208(b) would be equivalent to those of his counterpart in the private sector (see pages 7-8, *supra*), the proviso in 39 U.S.C. 409(b) renders the six-year statute of limitations contained in 28 U.S.C. (Supp. V) 2401(a) inapplicable to petitioner's action against the Postal Service.

2. The rule announced in *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, should be applied retroactively to petitioner's case. As the court of appeals observed (Pet. App. 6a), in the civil context a new decision generally is applied retroactively unless it "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Moreover, even if the "clear break" criterion is satisfied, the court must "go[] on to examine the history, purpose, and effect

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"applies, by its very terms, to actions between the Postal Service and a labor organization, or between labor organizations" already has been rejected by this Court in an analogous context. In *Smith* v. *Evening News Association*, 371 U.S. 195, 200-201 (1962), the Court declined to hold that "[t]he word 'between' * * * refers to 'suits,' not 'contracts,' and therefore only suits between unions and employers are within the purview of § 301" of the Labor Management Relations Act, 29 U.S.C. 185. See also *Bowen* v. *United States Postal Service*, *supra*, slip op. 2 n.2 (White, J., dissenting in part and concurring in part).

of the new rule, as well as the inequity that would be imposed by its retroactive application." *United States* v. *Johnson*, No. 80-1608 (June 21, 1982), slip op. 12-13 n.12. See also *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, slip op. 2 n.2 (O'Connor, J., dissenting).

These considerations suggest that there is no inequity in applying the six-month limitations period recognized in *DelCostello* here. Even assuming that *DelCostello* represents a "clear break" with prior law, *DelCostello extended* the time within which petitioner could have brought suit against his employer beyond that available under prior law. See also *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, slip op. 13-14.[7] Furthermore, contrary to petitioner's suggestion (Pet. 10), at the time of the arbitrator's decision in his case there were no precedents of either this Court or the Sixth Circuit that would have rendered reasonable reliance on the general six-year statute of limitations for civil actions against the United States (28 U.S.C. (Supp. V) 2401(a)).[8] In-

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[7] Although the Court in *DelCostello* (slip op. 6 n.11) did not have to reach the question of the retroactivity of *Mitchell*, Justice O'Connor, in dissent, noted (slip op. 2 n.2) that "*Mitchell* did not represent a 'clear break' with past law." See also *United Parcel Service, Inc.* v. *Mitchell*, *supra*, 451 U.S. at 60-62; Pet. App. 6a-7a.

[8] Even *Smart* v. *Ellis Trucking Co., Inc.*, 580 F.2d 215, 217 (6th Cir. 1978) (emphasis added), on which petitioner relies (Pet. 10), had construed *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), as causing "[t]he timeliness of actions under § 301 [to be] determined by reference to the appropriate *state* statute of limitations." In addition, although the *Smart* court rejected the contention that the timeliness of a Section 301 action against an employer for wrongful discharge was governed by the statute of limitations for actions

deed, the district court indicated (Pet. App. 6a) that petitioner had conceded that *United Parcel Service, Inc.* v. *Mitchell, supra*, which applied the statute of limitations for actions to vacate an arbitration award, governed his case against the Postal Service.

Moreover, any claim that petitioner in fact relied on a six-year statute of limitations as governing his action against the Postal Service would be highly suspect in view of the absence of any comparable statute of limitations that even arguably applied to his action against the unions.[9] Thus, it is extremely unlikely that petitioner would have waited 19 months to bring his action in reliance upon a statute of limitations applicable to only one-half of his suit. Finally, petitioner cannot successfully claim (Pet. 10) that he relied to his prejudice on an unpublished district court order entered almost a year after the arbitrator's decision in his case.[10]

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to vacate or modify an arbitration award (580 F.2d at 219; but see *Hill* v. *Aro Corporation*, 275 F. Supp. 482, 486-487 (N.D. Ohio 1967)), it applied a three-year statute of limitations instead only as a matter of *Michigan* law. Petitioner cannot reasonably have relied on a Michigan statute as governing his action brought in Ohio, and he has not alleged reliance on any comparable provision of Ohio law.

[9] As respondent unions have pointed out (Br. in Opp. 6-7), petitioner's action against them would be barred regardless of which of the following were applied: Ohio's three-month limitation on actions to vacate an arbitral award (Ohio Rev. Code Ann. § 2711.13 (Page 1981)), 29 U.S.C. 160(b)'s six-month statute of limitations, or Ohio's one-year limitations period for malpractice (Ohio Rev. Code Ann. § 2305.11 (Page Supp. 1982)).

[10] Subsequent to this Court's decision in *Mitchell*, the district court in *D'Andrea* v. *American Postal Workers Union* (Pet. 10) reversed itself and held that the employee's action against his employer was barred by Ohio's three-month statute of limi-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

JUNE 1983

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tations applicable to actions to set aside an arbitration award. The Sixth Circuit affirmed. 700 F.2d 335 (1983).

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No. 82-1667

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE S. LEACH,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

and

LOCAL 43, NATIONAL ASSOCIATION OF LETTER CARRIERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS NATIONAL ASSOCIATION OF LETTER CARRIERS, LOCAL 43, VINCENT SOMBROTTO, ED FISBECK and ED STRUNCK

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QUESTION PRESENTED

Whether a writ of certiorari should be granted to determine the statute of limitations applicable to petitioner's action against union respondents where his claim would be barred under any arguably relevant limitation period currently before the Court in Delcostello v. International Brotherhood of Teamsters, 679 F.2d 879 (4th Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2386) and United Steelworkers of America v. Flowers, 671 F.2d 87 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2408)?

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STATEMENT OF THE CASE

Petitioner was employed by the United States Postal Service ("the Postal Service") in

Cincinnati, Ohio. He was a member of Local 43 of the National Association of Letter Carriers ("Local 43"). By notice given August 29, 1978, petitioner was discharged from employment with the Postal Service, effective October 5, 1978.

Local 43 protested the discharge throughout the grievance procedure set forth in Article XV of the collective bargaining agreement between the Postal Service and the National Association of Letter Carriers ("NALC" or "the Union"). Local 43 ultimately requested arbitration of petitioner's discharge.

On February 20, 1979, Local 43 represented petitioner at an arbitration hearing before Arbitrator Alan Walt. By opinion and award dated February 20, 1979, Arbitrator Walt denied the grievance, thereby sustaining petitioner's discharge (A 54-66).*

On October 6, 1980, petitioner filed

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* References to the appendix in the Court of Appeals are denoted "A __". "Pet. __" refers to the petition herein. "Pet. __a" refers to the appendices to the petition.

a complaint alleging breach of the duty of fair representation by Local 43, the NALC and certain individual local and national union representatives (Pet. 23a). The complaint was filed over nineteen months after Arbitrator Walt issued his award.

By order dated and filed August 5, 1981, the district court granted all defendants' motions for summary judgment on the ground that petitioner's action was barred by Ohio's ninety-day statute of limitations governing actions to vacate arbitration awards (Pet. 13a). Petitioner's action was dismissed by the district court by judgment entered August 5, 1981 (Pet. 12a).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. By decision filed January 17, 1983, the court of appeals affirmed the judgment of the district court (Pet. 1a).

REASON THE WRIT SHOULD BE DENIED

Petitioner's Action Against Union Respondents is Barred Under Any Limitations Standard Adopted By the Court.

The ruling of this Court in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), applied the state arbitration limitation to wrongful discharge actions against employers. After Mitchell, the circuit courts of appeals have applied a variety of limitation standards to fair representation suits against unions. Under any arguably relevant limitation period now before the Court, petitioner's action is barred.

On April 25, 1983, the Court heard argument in two cases which raise the question of which limitations period should be applied to fair representation suits against unions. In Delcostello v. International Brotherhood of Teamsters, 697 F.2d 879 (4th Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2386), the Fourth

Circuit applied Maryland's thirty-day period governing actions to vacate arbitration awards. In United Steelworkers of America v. Flowers, 671 F.2d 87 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2408), the Second Circuit applied New York's three-year nonmedical malpractice statute of limitations.

These cases have presented the Court with the question of whether fair representation actions against unions should be governed by the six-month limitations period set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), or by the appropriate state arbitration limitation.*

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* Petitioner here has suggested that a six-year limitation period should be applied to actions against federal employers such as the Postal Service (Pet. 5-8). This issue is not raised by the two cases currently before the Court. Petitioner concedes, however, that this provision does not apply to private parties such as unions. Accordingly, this claim will not be addressed by union respondents herein. (cont'd.)

The Court's action on the cases now before it cannot add to the reviewability of the instant case. The issues raised in those cases, and by petitioner here, also do not warrant holding this petition in abeyance until determination of Delcostello and Flowers.

Petitioner's claim against the Union respondents is barred regardless of which limitation period this Court adopts. Petitioner filed his action nineteen months after Arbitrator Walt issued his award. Thus, his action is barred under both the six-month limitation set forth in §10(b) of the National Labor Relations Act and the Ohio statute providing a ninety-day limitation on actions to vacate an arbitral award.

(cont'd.)
Petitioner also asserts that the court below should not have applied Mitchell retroactively. This question is already raised in Delcostello. Even if the Court finds that Mitchell may not be applied retroactively, such a determination would be irrelevant to disposition of petitioner's claim, which would be time barred under any limitation period adopted by the Court in the cases now before it.

Petitioner's suit is also barred if the Court adopts the Flowers nonmedical malpractice rule. Ohio law provides a one-year limitation period governing actions for various torts and for malpractice. Ohio Revised Code Section 2305.11 (copy annexed hereto as Appendix A). The Ohio courts have explicitly applied this statute to legal malpractice. Keaton Co. v. Kolby, 27 Ohio St. 2d 234 (Sup. Ct. 1971); Hibbett v. Cincinnati, 4 Ohio App. 3d 128 (Ct. App. 1982).

Thus, any ruling by the Court on the limitations questions in the cases before it can have no effect on the correctness or reviewability of the decision below.

CONCLUSION

The petition for writ of certiorari should be denied.

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APPENDIX A

§2305.11 [Time limitations for bringing certain actions; definitions.]

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that indivi-

dual, then an action by the individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital or a dental claim against a dentist be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, hospital, or dentist apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of

of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

(5) "Dentist" means all persons licensed to practice dentistry by the state dental board.

(6) "Dental claim" means any claim asserted in any civil action against a dentist arising out of a dental operation or the dental diagnosis, care, or treatment of any person.